Supreme Court, U.S.
FILED

08-904 JAN 14 2009

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

PAMELA S. HENSLEY; MICHAEL M. HENSLEY, husband and wife each of them and their marital community thereof,

Petitioners,

v.

UNITED STATES OF AMERICA, as substituted party for Edward and Jane Doe Eich,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Howard M. Goodfriend
Counsel of Record
Catherine W. Smith
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

QUESTION PRESENTED

Whether a plaintiff's cause of action under the Federal Tort Claims Act *accrues when* the plaintiff discovers, or reasonably should discover, not just the physical cause of injury, but the government's involvement in that physical cause?

TABLES OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

A. The Ninth Circuit's Opinion Conflicts With Decisions From Other Circuits Regarding When A Tort Claim Against The Government "Accrues." 5

B. This Conflict Is Of Recurring National Importance Because States In Each Of The Circuits Have Statutes Of Limitations That Are Longer Than The FTCA Statute Of Limitations 8

CONCLUSION 10

APPENDICES

Opinion of the Ninth Circuit Court of Appeals (July 9, 2008).....A-1–A-12

Judgment (May 23, 2006).....A-13

Findings of Fact and Conclusions of Law (May 1, 2006).....A-14–A-25

Order on Defendant USA's Motion to Dismiss (March 13, 2006).....A-26–A-32

Order on Motion to Dismiss (September 21, 2004).....A-33–A-43

Order Denying Petition For Panel Rehearing And Petition For Rehearing En Banc (October 16, 2008).....A-44

TABLE OF AUTHORITIES

CASES

Celestine v. Mt. Vernon Health Center, 403 F.3d 76 (2d Cir. 2005) 9

Diaz v. United States, 165 F.3d 1337 (11th Cir. 1999) 6, 8

Drazan v. United States, 762 F.2d 56 (7th Cir. 1985) 6

Dyniewicz v. United States, 742 F.2d 484 (9th Cir. 1984) 5-7

Garza v. U.S. Bureau of Prisons, 284 F.3d 930 (8th Cir. 2002) 6, 8

Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) 6, 7

Skwira v. United States, 344 F.3d 64 (1st Cir. 2003), *cert. denied*, 542 U.S. 903 (2004) 6, 8

United States v. Kubrick, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979) 7, 8

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2401 ..... 1, 5, 6, 10

28 U.S.C. § 2679 ..... 1-5, 9, 10

Pub. L. 100-694, § 2(a)(2) (1988) 10

STATE STATUTES

Ark. Code Ann. § 16-56-105 9
D.C. Code Ann. § 12-301(8) 9
Del. Code Ann. tit. 10, § 8106 9
Fla. Stat. Ann. § 95.11(3) 9
Mass. Ann. Laws ch. 260 § 2A 9
Md. Code Ann. Cts. & Jud. Proc. § 5-101 9
Me. Rev. Stat. Ann. tit. 14, § 752 9
Mich. Comp. Laws § 600.5805(10) 9
Minn. Stat. Ann. § 541.05 9
Miss. Code. Ann. § 15-1-49 9
Mont. Code Ann. § 27-2-204 9
N.C. Gen. Stat. § 1-52(5) 9
N.D. Cent. Code § 28-01-16(5) 9
N.H. Rev. Stat. Ann. § 508:4 9
N.M. Stat. Ann. § 37-1-8, 3 9
Neb. Rev. Stat. § 25-207 9
N.Y. C.P.L.R. § 214(5) 9
S.C. Code Ann. § 15-3-530(5) 9
S.D. Codified Laws § 15-2-14(3) 9
R.I. Gen. Laws § 9-1-14(b) 9
Utah Code Ann. § 78B-2-307 9
VT. Stat. Ann. tit. 12, § 512(4) 9
Wash. Rev. Code Ann. § 4.16.080(2) 9
Wis. Stat. Ann. § 893.54(1) 9
Wyo. Stat. § 1-3-105(a) 9

PETITION FOR WRIT OF CERTIORI

OPINIONS BELOW

The July 9, 2008 Opinion of the Ninth Circuit Court of Appeals, attached as Appendix A-1–A-12, is reported at 531 F.3d 1052 (9th Cir. 2008). The Hensleys' Petition For Panel Rehearing And Petition For Rehearing En Banc was denied on October 16, 2008 in the Order attached as Appendix A-44. The district court's May 23, 2006 Judgment is not reported and is attached as Appendix A-13. The district court's May 1, 2006 Findings of Fact and Conclusions of Law is not reported and is attached as Appendix A-14–A-25. The district court's March 13, 2006 Order on Defendant USA's Motion to Dismiss is not reported and is attached as Appendix A-26–A-32. The district court's September 21, 2004 Order on Motion to Dismiss is not reported and is attached as Appendix A-33–A-43.

JURISDICTION

On October 16, 2008 the Ninth Circuit entered an Order Denying the Petition For Panel Rehearing And Petition For Rehearing En Banc of its July 9, 2008 Opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of 28 U.S.C. § 2401 and 28 U.S.C. § 2679 as follows:

28 U.S.C. § 2401(b):

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2679(b)(1):

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

28 U.S.C. § 2679(d)(2):

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

STATEMENT OF THE CASE

On November 6, 2000, Pamela Hensley was injured in a rear-end collision caused by the negligence of Naval Reserve Ensign Edward C. Eich. Eich was driving his private vehicle on a public road leaving the front gate of the Whidbey Island Naval Station near Oak Harbor, Washington. After being taken to the hospital, Mrs. Hensley was directed by a military police officer "to follow up with the

defendant's insurance company who was identified and listed on the vehicle information exchange sheet." When she did so, Eich's insurance adjuster told her repeatedly that her claim could not be settled until she completed medical treatment, and that she had three years from the date of the accident to file a lawsuit under Washington law.

Several months before the expiration of Washington's three year statute of limitations, Mrs. Hensley retained counsel, who filed a lawsuit against Eich in Washington state court on October 24, 2003. On February 11, 2004, the federal government certified that Eich was acting within the scope of employment as a naval officer at the time of the accident, removed the case to district court under 28 U.S.C. § 2679(d), and moved to dismiss on the grounds that plaintiff had failed to file an administrative claim against the government within two years of the accident.

The district court denied the government's motion to dismiss, noting that the action against the government could not have accrued until plaintiff knew she had a claim against the United States, and not against its employee Eich in his private capacity. (App. A-43) The district court stayed the action pending resolution of plaintiffs' administrative claim, filed on November 23, 2004, which the government denied on statute of limitations grounds on May 18, 2005. The district court thereafter denied defendant's renewed motion to dismiss.

The district court held that the Hensleys' action was timely because it was brought within the three year Washington statute of limitations and

because Mrs. Hensley could not reasonably have ascertained that Eich was acting within the scope of federal employment at the time of the accident or before the action was certified and removed pursuant to 28 U.S.C. § 2679. (App. A-31–A-32) The government did not ask the district court to reexamine at trial the factual basis for its determination that plaintiff innocently believed her claim was against Eich, rather than the government, before Section 2679 certification, and the district court incorporated its orders denying the government's motions to dismiss into its findings and conclusions after trial. (App. A-24)

The Ninth Circuit reversed, holding that the Hensleys' cause of action for negligence accrued on the date Mrs. Hensley was injured in an automobile accident, and that her "ignorance of the involvement of United States employees is irrelevant." 531 F.3d at 1057, *quoting* ***Dyniewicz v. United States***, 742 F.2d 484, 487 (9th Cir. 1984). (App. A-8)

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Opinion Conflicts With Decisions From Other Circuits Regarding When A Tort Claim Against The Government "Accrues."

A claim against the United States under the Federal Tort Claims Act must be "presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). The term "accrues" is not defined in the statute. The Ninth Circuit's decision in this case conflicts with decisions by the First, Seventh, Eighth and Eleventh

Circuits, which have held that the two year statute of limitations under 28 U.S.C. § 2401(b) accrues when plaintiff knows not just of the facts of her injury, but its causal connection to the government. ***Skwira v. United States***, 344 F.3d 64, 76-80 (1st Cir. 2003) (accrual under FTCA in most tort cases occurs where plaintiff knows of fact of injury and causal connection to government), *cert. denied*, 542 U.S. 903 (2004); ***Diaz v. United States***, 165 F.3d 1337, 1339-40 (11th Cir. 1999) (knowledge of decedent's suicide did not start running of two year statue of limitations absent knowledge of plaintiff's medical treatment by the government); ***Drazan v. United States***, 762 F.2d 56, 59 (7th Cir. 1985) (FTCA claim does not accrue until plaintiff discovers or reasonably should discover governmental cause of injury); *see also* ***Garza v. U.S. Bureau of Prisons***, 284 F.3d 930 (8th Cir. 2002) (affirming dismissal of wrongful death action for failure to notify victim of inmate's escape under two year statute where plaintiff had sufficient knowledge to make inquiry into relationship between City, which housed inmate, and Bureau of Prisons, which was responsible for his supervision).

Rejecting this discovery standard, the Ninth Circuit in this case relied on its previous decisions in ***Gibson v. United States***, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) and ***Dyniewicz v. United States***, 742 F.2d 484 (9th Cir. 1984), to hold that Mrs. Hensley's claim accrued when she "'knew both the fact of injury and its immediate physical cause.' The plaintiffs' 'ignorance of the involvement of Untied States employees is irrelevant' to determining when [the] claim accrues." 531 F.3d at 1057, *quoting* ***Dyniewicz***, 742 F.2d at 487. (App.

A-8) The Ninth Circuit held that the Hensleys' claim was untimely because "[a]t the moment Eich struck Mrs. Hensley's car with his own, the Hensleys knew both the fact of the injury and its immediate physical cause." 531 F.3d at 1057 (App. A-8).

Dyniewicz and ***Gibson*** improperly limited the discovery rule adopted by this Court in ***United States v. Kubrick***, 444 U.S. 111, 118, 100 S. Ct. 352, 62 L.Ed.2d 259 (1979) to cases involving "medical malpractice or hidden injuries." ***Dyniewicz***, 742 F.2d at 486. This Court in ***Kubrick*** did not define accrual in terms of a plaintiff's knowledge that the tortfeasor's actions constituted negligence because "[a] plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community" regarding whether the defendant's actions amounted to a breach of a legal duty of care. 444 U.S at 123. But this limitation does not affect the requirement that a plaintiff also must have sufficient knowledge of the cause of injury to trigger accrual under Section 2401(b), which is at issue in this case. The Ninth Circuit's decisions in ***Dyniewicz***, ***Gibson***, and in this case misapply ***Kubrick's*** holding to deny a plaintiff a cause of action before the plaintiff knows or reasonably should know that the injury is caused by a tortfeasor acting within the scope of federal employment. Just as in the medical malpractice context, it is unjust to require a plaintiff to initiate a claim before he or she knows of both the injury and its cause; where a plaintiff "did not understand that the employee was on federal business at the time of the accident . . . it is inequitable to hold a plaintiff to a strict accrual rule." (App. A-30–A-31)

This principle was recognized by the First Circuit in ***Skwira***, which interpreted ***Kubrick*** to hold that a claim accrues only when the "plaintiff knows, or in the exercise of reasonable diligence should know, (1) of her injury and (2) sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury." 344 F.3d at 78. Similarly, the Eleventh Circuit in ***Diaz*** held that "in order for a claim to accrue, a plaintiff must have some indication that there may have been a government cause of the injury." 165 F.3d at 1340. And in ***Garza***, the Eighth Circuit held that the plaintiff's claim accrued when the estate's lawyer pursued the plaintiff's claims because it then became apparent that there was a relationship between the municipal halfway house from which the inmate escaped and the Bureau of Prisons. 284 F.3d at 936-37.

B. This Conflict Is Of Recurring National Importance Because States In Each Of The Circuits Have Statutes Of Limitations That Are Longer Than The FTCA Statute Of Limitations.

This issue is of recurring national importance because the Ninth Circuit's reasoning will lead to dismissal of claims against the government on the grounds that the federal statute of limitations has expired before deserving plaintiffs even know they have a federal claim. As in 24 other states and the

District of Columbia,[1] located in every federal circuit, Washington state's statute of limitation is longer than the federal statute of limitations. *See* ***Celestine v. Mt. Vernon Health Center,*** 403 F.3d 76, 83-84 (2d Cir. 2005) (recognizing that it would be "unjust" to treat as federally barred a timely state suit brought by a plaintiff reasonably thinking he had a state law claim). This unjust result can arise whenever a civil action is certified for removal under 28 U.S.C. § 2679 from state court in a jurisdiction where the tort statute of limitations is longer than the two-year federal statute of limitations.

A cause of action arising out of the government's certification that an individual defendant was acting within the scope of employment "accrues" only when the plaintiff knows her injury was caused by an employee acting within his federal employment. Pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(2), upon certification by the Attorney General that a defendant in a state court action was acting within the scope of federal employment at the

---

[1] ARK. CODE ANN. § 16-56-105; DEL. CODE ANN. tit. 10, § 8106; D.C. CODE ANN. § 12-301(8); FLA. STAT. ANN. § 95.11(3)(a); ME. REV. STAT. ANN. tit. 14, § 752; MD. CODE ANN. CTS. & JUD. PROC. § 5-101; MASS. ANN. LAWS ch. 260 § 2A; MICH. COMP. LAWS § 600.5805(10); MINN. STAT. ANN. § 541.05; MISS. CODE. ANN. § 15-1-49; MO. REV. STAT. § 516.120(4); MONT. CODE ANN. § 27-2-204; NEB. REV. STAT. § 25-207; N.H. REV. STAT. ANN. § 508:4; N.M. STAT. ANN. § 37-1-8, 3; N.Y. C.P.L.R. § 214(5); N.C. GEN. STAT. § 1-52(5); N.D. CENT. CODE § 28-01-16(5); R.I. GEN. LAWS § 9-1-14(b); S.C. CODE ANN. § 15-3-530(5); S.D. CODIFIED LAWS § 15-2-14(3); UTAH CODE ANN. § 78B-2-307; VT. STAT. ANN. tit. 12, § 512(4); WASH. REV. CODE ANN. § 4.16.080(2); WIS. STAT. ANN. § 893.54(1); WYO. STAT. § 1-3-105(a)(iv).

time of an accident, the action is deemed an action against the United States, which can remove the case to federal court and is substituted as party defendant. For purposes of removal, the Attorney General's certification "shall conclusively establish scope of office or employment . . ." 28 U.S.C. § 2679(d)(2).

"Accrual" can not be defined, and the government can not evade substantive liability "in the same manner in which the common law historically has recognized the responsibility of an employer," Pub. L. 100-694, § 2(a)(2) (1988), by timing a certification that is intended to protect both the employee and the injured person, to instead manufacture an argument that the statute of limitations has run before plaintiff is aware that she has a federal claim. Yet that is the result in this case, and it will be the result in any case where the plaintiff reasonably did not learn of her claim against the government until the Attorney General certified a civil action for removal to federal court in a state where the statute of limitations for tort claims is longer than that under the Federal Tort Claims Act.

CONCLUSION

This Court should accept review and adopt the reasoning of those circuits that hold that a claim under 28 U.S.C. § 2401(b) only accrues when a plaintiff knows the fact of injury and its governmental cause.

DATED this 12th day of January, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: Howard M. Goodfriend
Counsel of Record
Catherine W. Smith

Attorneys for Petitioners Hensley

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAMELA S. HENSLEY; MICHAEL M. HENSLEY, husband and wife each of them and their marital community thereof

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, as substituted party for Edward and Jane Doe Eich,

Defendant-Appellant

No. 06-35619

D.C. No. CV-04-00302-MJP

OPINION

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted
May 8, 2008—Seattle, Washington

Filed July 9, 2008

Before: Susan P. Graber and Johnnie B. Rawlinson, Circuit Judges, and Otis D. Wright II,* District Judge.

Opinion by Judge Graber

*The Honorable Otis D. Wright II, United States District Judge for the Central District of California, sitting by designation.

COUNSEL

William G. Cole, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C., for the defendant-appellant.

Howard M. Goodfriend, Edwards, Sieh, Smith & Goodfriend, P.S., Seattle, Washington; Lincoln D. Sieler, Mosler, Schermer, Wallstrom, Jacobs & Sieler, Seattle, Washington, for the plaintiffs-appellees.

OPINION

GRABER, Circuit Judge:

In this negligence action arising from a car accident, we are called upon to decide when the plaintiffs' claim accrued for purposes of measuring the two-year statute of limitations under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2401, 2671-2680 As required by binding precedent, we hold that the claim accrued at the time of the collision and not later when the Attorney General certified that the driver of the other vehicle was acting within the scope of his federal employment at the time of the collision. Accordingly, we reverse the judgment in favor of the plaintiffs and remand with instructions to dismiss the action.

FACTUAL AND PROCEDURAL HISTORY

On November 6, 2000, a car driven by Ensign Edward C. Eich, an active duty commissioned officer in the United States Navy Reserve, struck from behind a car driven by Pamela Hensley, the wife of an active duty Chief Petty Officer in the United States

Navy. Mrs. Hensley suffered serious injuries as a result of the collision.

The collision occurred on the grounds of the Whidbey Island Naval Air Station. Although Eich was driving his personal vehicle, he was wearing his Navy uniform at the time of the crash. Mrs. Hensley saw that Eich was in uniform and testified that she knew from seeing the uniform that he was a Navy officer. Military police were called to the scene. An ambulance took Mrs. Hensley to a Navy hospital, where she received treatment.

The military police promptly prepared an incident report. It included the information that Eich was employed as a Navy officer. Mrs. Hensley did not receive a copy of that report. Instead, while at the hospital, she received a "Vehicle Information Exchange Sheet" containing Eich's name and address, along with information about his personal insurance carrier, United Services Automobile Association ("USAA"). That sheet did not identify Eich as a member of the military. A military police officer who visited Mrs. Hensley at the hospital advised her to follow up with Eich's insurance company.

During the next two years, Mrs. Hensley contacted USAA many times. According to her declaration, USAA told her that she had three years under Washington law to file suit if settlement negotiations proved unproductive.

Mrs. Hensley did not hire a lawyer until August 2003, nearly three years after the accident. Counsel pursued further discussions with USAA. When negotiations failed, the Hensleys filed suit against

Eich and his wife in Washington state court on October 24, 2003—less than three years, but more than two years, after the accident.

That action was removed to federal court in early 2004. Following certification that Eich was acting within the scope of his federal employment at the time of the accident, the United States substituted itself for the Eichs pursuant to 28 U.S.C. § 2679(d)(1). The United States also moved to dismiss the Hensleys' complaint for lack of subject matter jurisdiction.[1] Among other reasons,[2] the government cited the FTCA's two-year statute of limitations, 28 U.S.C. § 2401(b). In response, the Hensleys argued that the statute of limitations should be equitably tolled because Mrs. Hensley had no reason to think that Eich was acting within the scope of his employment, a military police officer suggested that she contact Eich's private insurance carrier, and

---

[1] Before the district court ruled on the government's motion to dismiss, the Hensleys amended their complaint to add claims against USAA for negligent misrepresentation regarding the applicable statute of limitations. On stipulation of the parties, the claims against USAA were dismissed with prejudice, before trial, leaving only the United States as a defendant.

[2] The Hensleys did not file an administrative claim before filing suit, as required by 28 U.S.C. § 2675(a). Because we dispose of the case on statute of limitations grounds, we need not reach the interpretive questions that the parties raise concerning the revisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), Pub. L. No. 100-964, §§ 5-6, 102 Stat. 4563, 4564-65 (1988), to 28 U.S.C. § 2679(d)(5), providing that an action that is removed to federal court generally is considered timely if the administrative claim would have been timely had the claim been filed on the date of commencement of the state action.

USAA representatives assured her that her claim would be settled after she provided more information.

The district court ruled that the Hensleys' suit was timely: "[I]f a civil action is instituted within the applicable state limitations period, an FTCA claim does not accrue for limitations purposes until the plaintiff knows or should have known that the alleged tortfeasor was acting within the scope of federal employment . . . ." With respect to the Hensleys' alternative equitable tolling argument, the district court observed that this "is not an equitable tolling case."

Following a bench trial, the district court found that Eich had operated his car negligently. The court thus ruled in favor of the Hensleys and awarded them more than $1.5 million. The government timely appealed from the resulting judgment.

STANDARDS OF REVIEW

We review de novo a district court's interpretation of the statute of limitations under the FTCA, *Lehman v. United States*, 154 F.3d 1010, 1013 (9th Cir. 1998), and its decision as to whether a statute of limitations bars a claim, *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000). The district court's decision regarding equitable tolling is "generally reviewed for an abuse of discretion, unless the facts are undisputed, in which event the legal question is reviewed de novo." *Id.*

DISCUSSION

A. *The Hensleys' Claim Accrued at the Time of the Car Accident.*

[1] The FTCA waives sovereign immunity for claims against the federal government arising from torts committed by federal employees who are acting within the scope of their employment. 28 U.S.C. §§ 1346(b)(1), 2679(d)(1). But the statute provides that a tort claim "shall be forever barred" unless it is presented "within two years after such claim accrues." *Id.* § 2401(b). As a general rule, a claim accrues "when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir. 1986) (internal quotation marks omitted). In addition, as a general rule, ignorance of the involvement of government employees is irrelevant to accrual of a federal tort claim. *Dyniewicz v. United States*, 742 F.2d 484, 487 (9th Cir. 1984).

[2] In certain circumstances, such as claims involving medical malpractice, accrual does not occur until a plaintiff knows of both the existence of an injury and its cause. *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979). But accrual does not await a plaintiff's awareness, whether actual or constructive, of the government's negligence. *Id.* at 125. As the Court explained:

> A plaintiff . . . , armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.

Id. at 123.

In *Gibson*, we expressly refused to expand the Supreme Court's holding in *Kubrick* "to delay accrual of a federal tort claim until plaintiff knows or has reason to know of the culpability of federal agents." 781 F.2d at 1344. There, the plaintiffs alleged that government agents were responsible for burning down their garage. They argued that their claim did not accrue for the purpose of the statute of limitations until more than three years after the fire, when they finally learned of the government's alleged complicity in the arson. *Id.* at 1343-44. Although we recognized that the plaintiffs could find some support in the "[l]anguage in *Kubrick*[ ] emphasizing the strategic importance to the litigant of knowing whom to sue," *Dyniewicz* required us to hold that the claim accrued when the plaintiffs learned of the property damage itself. *Id.* at 1344.

Dyniewicz, on which we relied in *Gibson*, is factually similar to the present case. The plaintiffs filed a wrongful death claim against the State of Hawaii for the deaths of a husband and wife who had died in a flood. *Dyniewicz*, 742 F.2d at 485. While that timely state court action was ongoing, but approximately two years and three months after the deaths, the plaintiffs learned that National Park Service rangers might have played a part in causing the deaths. *Id.* The plaintiffs promptly filed an administrative claim, asserting a cause of action under the FTCA. We held that the claim was time-barred because it was not submitted within two years of the date of its accrual. *Id.* at 486.

[3] We reiterated the rule that the claim accrued when the plaintiffs "knew both the fact of injury and its immediate physical cause." *Id.* at 487. The plaintiffs' "ignorance of the involvement of United States employees is irrelevant" to determining when their claim accrues. *Id.*; *accord Gould v. U.S. Dep't of Health & Human Servs.*, 905 F.2d 738, 743 n.2, 745 (4th Cir. 1990) (en banc) (discussing *Dyniewicz* and holding that the FTCA statute of limitations "does not wait until a plaintiff is aware that an alleged tortfeasor is a federal employee"); *Zeleznik v. United States*, 770 F.2d 20, 23 (3rd Cir. 1985) (following *Dyniewicz* and holding that accrual of an FTCA claim is not delayed until the injured party learns of possible government liability); *Steele v. United States*, 599 F.2d 823, 827-28 (7th Cir. 1979) (holding that the plaintiff's assertion that "he neither knew, nor in the exercise of reasonable diligence could have known" about the government's possible liability for his injury was irrelevant to accrual of his FTCA claim). Moreover, we held that even the government's silence concerning the possible negligence of the rangers did not toll the statute of limitations in the absence of fraudulent concealment. *Dyniewicz*, 742 F.2d at 487; *see also Davis v. United States*, 642 F.2d 328, 331 (9th Cir. 1981) ("In the absence of fraudulent concealment it is plaintiff's burden, within the statutory period, to determine whether and whom to sue.").

[4] At the moment Eich struck Mrs. Hensley's car with his own, the Hensleys knew both the fact of the injury and its immediate physical cause. *Dyniewicz*, 742 F.2d at 487. The fact that Mrs. Hensley suffered an injury was immediately apparent; the cause (a collision) was immediately apparent; and even the

identity of the person who inflicted the injury (Eich) was immediately apparent. Therefore, the Hensleys' claim accrued at the time of the accident. That being so, their suit was untimely under 28 U.S.C. § 2401(b) because it was filed more than two years later. In the absence of an equitable remedy, the district court lacked jurisdiction.

The relevant precedents provide no support for the district court's compassionate holding that accrual of the Hensleys' claim awaited the moment when they knew or should have known that Eich was acting within the scope of his federal employment. *See Dyniewicz*, 742 F.2d at 487 ("[I]gnorance of the involvement of United States employees is irrelevant."). As the Supreme Court emphasized in *Kubrick*, 444 U.S. at 123, armed as they were with the available facts, the Hensleys could have protected their FTCA claim by seeking legal advice sooner.

B. *The Doctrine of Equitable Tolling Does Not Help the Hensleys.*

[5] "Equitable tolling focuses primarily on the plaintiff's excusable ignorance of the limitations period." *Lehman*, 154 F.3d at 1016 (emphasis omitted). The doctrine applies "in situations where, despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim," *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc) (alteration in original) (internal quotation marks omitted), or where the party invoking the doctrine "has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," *Irwin v. Dep't of Veterans Affairs*,

498 U.S. 89, 96 (1990); *see also Dyniewicz*, 742 F.2d at 487 (stating that equitable tolling would not apply in the absence of "fraudulent concealment" of information). The doctrine "is not available to avoid the consequence of one's own negligence," *Lehman*, 154 F.3d at 1016, and does not apply "when a late filing is due to claimant's failure 'to exercise due diligence in preserving his legal rights,' " *Scholar v. Pac. Bell*, 963 F.2d 264, 268 (9th Cir. 1992) (quoting *Irwin*, 498 U.S. at 96)). Because the relevant facts are undisputed, we consider the Hensleys' equitable tolling argument de novo, *Santa Maria*, 202 F.3d at 1175, and agree with the district court that "this is not an equitable tolling case."

The Hensleys make three arguments for application of the equitable tolling doctrine, but we find none persuasive. First, they point out that a military police officer told Mrs. Hensley that she should follow up with Eich's insurance carrier and that military police failed to supply a copy of their report or any other document identifying Eich as an active duty member of the military. But Mrs. Hensley knew that Eich was on a military base and in uniform at the time of the crash, she knew that military police responded to the incident, and she knew that she was taken to a military hospital for treatment of her injuries—facts that gave the Hensleys good reason to investigate whether Eich was acting within the scope of his employment at the time of the accident. Second, the Hensleys argue that USAA representatives affirmatively misled them into thinking that they had a claim against Eich only in his personal capacity. But USAA was not acting on behalf of, nor was it capable of binding, the

government, and there is no evidence that USAA was attempting to induce the Hensleys to allow the FTCA statute of limitations to expire. Third, the Hensleys suggest that the government's belated certification was calculated to preclude a timely tort claim. But *the Hensleys* controlled the timing of the government's certification; nothing put the government on notice of their claim until the Hensleys filed suit in state court nearly three years after the accident. *See* 28 U.S.C. § 2679(c) (providing for a government employee against whom a civil action is commenced to deliver copies of the pleadings and process to a designated supervisor who, in turn, shall forward the documents to the relevant United States Attorney).

[6] In short, the Hensleys did not exercise due diligence to investigate Eich's status at the time of the accident, and the government did not engage in any fraudulent concealment, misconduct, or trickery that would have lulled the Hensleys into letting their rights lapse. The burden was on them to determine whether and whom to sue, within the applicable statute of limitations. *Gibson*, 781 F.2d at 1344.

CONCLUSION

As the Supreme Court has succinctly stated, "[i]t goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable." *Kubrick*, 444 U.S. at 125. Regrettably, this is one of those unhappy cases in which a statute

of limitations makes it impossible to enforce what was otherwise a valid claim.

REVERSED and REMANDED with instructions to dismiss the action.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HENSLEY, Plaintiffs, v. UNITED STATES OF AMERICA, et al. Defendants.	No. 2:04-cv-00302-MJP JUDGMENT (proposed) NOTE ON MOTION CALENDAR: MAY 19, 2006

This action came on before the Court, Honorable Marsha J. Pechman, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

that the plaintiffs Pamela and Michael Hensley recover of the defendant the United States of America the sum of $1,550,000, with interest thereon at the rate provided by 28 U.S.C. 1961 and their costs of action.

Dated at Seattle, Washington this 22 day of May, 2006.

/s/ Marsha J. Pechman
Hon. Marsha J. Pechman
U.S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAMELA and MICHAEL HENSLEY, Plaintiff(s), v. UNITED STATES OF AMERICA, Defendant(s).	NO. C04-302P FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come for trial before the Honorable Marsha J. Pechman commencing on April 17, 2006, the parties being represented by their counsel: Paul Wallstrom and Lincoln Sieler, for Plaintiffs, and Robert Brouillard of the U.S. Attorney's Office, for Defendant; the Court having heard the testimony of witnesses, admitted exhibits into evidence, reviewed the court file, and having heard argument of counsel; the parties having rested following the presentation of their cases, the Court hereby reaches the following findings of fact and conclusions of law. Should a finding of fact more properly be considered a conclusion of law, it should be so construed. Similarly, if a conclusion of law is more appropriately a finding of fact, it should be so construed.

NOW, THEREFORE, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Collision

1. On November 6, 2000, Pamela Hensley was driving her car on the Whidbey Island Naval Air Station. At the moment of impact, she was stopped, allowing oncoming cars to pass before turning left. Her left turn signal was on.

2. Edward C. Eich, a lieutenant in the U.S. Navy at the time, was also driving on that day. He was following Ms. Hensley in the same lane of travel, when he hit the rear end of her car, failing to stop. He was traveling 15-20 miles per hour at the time of the collision. There is no evidence of alcohol consumption on Mr. Eich's part.

3. Mr. Eich contacted the military police and provided his personal information. It was not until he was served with the lawsuit and consulted a friend who was a military lawyer that he knew or appreciated that the fact that he was on base attending a training session of the Navy was of any factual or legal significance.

4. Ms. Hensley's car was not driveable after the impact and it had to be dragged from the lane of travel.

5. Ms. Hensley was taken to the hospital by ambulance.

6. The government has stipulated that Mr. Eich was within the scope of his employment with the U.S. Navy at the time of impact.

Ms. Hensley Prior to Nov. 6, 2000

7. Ms. Hensley was 44.35 years old on the day of the collision. Her date of birth is July 2, 1956.

8: She is married to Michael Hensley. They married each other for the second time 1990. Their first marriage ended in divorce. Ms. Hensley has two daughters from her intervening remarriage to her second husband. After the marriage, Mr. Hensley played a significant role in the family as a father figure to his two step-daughters.

9. Ms. Hensley was trained as a hairdresser and had practiced that profession and maintained her licenses for 26 years. Immediately prior to November 6, 2000 she was working 7 days every two weeks, alternating 3 days one week and four days the next. Her income was growing in the years immediately preceding the impact. She was well-liked by her employer and considered an excellent employee. There were no problems with her attendance or attention to her work. Ms. Hensley and her employer had plans for Ms. Hensley to purchase the

business upon her employer's retirement.

10. In addition to her reported Social Security earnings, Ms. Hensley earned approximately $50 a week in tips from her customers.

11. Ms. Hensley performed all household chores, including cooking, shopping, cleaning, laundry, sewing, driving the children and managing household expenses. Mr. Hensley's Navy career required that he be out to sea for long periods of time and it fell to Ms. Hensley to maintain, manage and care for the family home. In addition, she was involved in gardening, household maintenance and construction projects.

12. Ms. Hensley also provided household care and services to her live-in mother-in-law. She provided meals, mobility assistance, errands and entertainment to her mother-in-law.

13. In 2000, prior to the impact, Ms. Hensley traveled with her mother-in-law to Hawaii and Hong Kong and managed all travel arrangements, luggage transfers and mobility support for her mother-in-law.

14. Ms. Hensley's personal time was occupied with sewing, Bible study, bowling, snorkeling, scuba diving and baby-sitting her infant grandchildren.

15. Ms. Hensley had significant health issues, including diabetes, morbid obesity, hypertension and a smoking habit of one pack a day. In addition, she suffered from depression which was controlled with antidepressant medication. None of these conditions impacted her daily activities or work.

16. Throughout her life, Ms. Hensley suffered back pain or a "stiff neck" periodically.

17. A the time of the incident, there was no back pain or evidence of paresthesia causing any pain or disability.

Treatment Following November 6, 2000

18. Ms. Hensley was taken from the accident to the Naval Hospital and she received treatment care from a series of Navy doctors.

19. Ms. Hensley was treated for back strain, left face and body numbness and chronic pain syndrome. Her depression was aggravated and has become worse over time.

20. Treating physicians Drs. Hwang, Robinson and Kozmary testified that Ms. Hensley's back pain, numbness and chronic pain syndrome were causally related to the motor vehicle accident of November 6, 2000. The government offered no expert testimony to contradict the doctors' opinions.

21. All doctors have found that Ms. Hensley cannot work. No contrary opinion was offered by the government.

22. Dr. Robinson supported Ms. Hensley's request for a permanent disability rating from the Social Security Administration. Dr. Robinson concluded. that, because of the accident of November 2000, her overriding problem is chronic pain syndrome, and he concurred with the consulting neurologist that she should be given consideration for permanent disability. The government offered no expert opinion to contradict this opinion.

23. Ms. Hensley has been classified as totally and permanently disabled by the Social Security Administration and she cannot work now or in the future.

24. Between the time of the incident on November 6, 2000 and January of 2006, Ms. Hensley's daily activities were restricted. She was still able to travel with assistance, do some light housekeeping occasionally, drive a car and interact with her friends and family on social occasions. Her fatigue and pain had to be controlled with rest and medication. Her depression became more and more evident.

25. In January 2006, she underwent an epidural steroid injection to assist with her chronic pain syndrome. This

treatment worsened her pain and caused a blood clot to develop around her spinal cord.

26. This hematoma has reduced Ms. Hensley's activity level. She is in almost continual pain and spends nearly all her time in bed. Her household activities are completely restricted and she must use a wheelchair in order to be mobile. There has been a severe reduction in her interaction with friends, and family.

27. The Court finds Ms. Hensley's characterization of her condition to be truthful.

28. Ms. Hensley's increased pain as a result of the January 2006 injection is the direct result of medical treatment necessary to control the chronic pain syndrome caused by the motor vehicle accident of November 6, 2000.

29. According to Dr. Kozmary, Ms. Hensley is expected to return to her pre-January 2006 level of pain and activity within 6 months (October 2006).

Loss of Consortium

30. Prior to the motor vehicle accident, the Hensleys had a close and loving relationship. Their first marriage to each other was marred by alcohol and domestic violence abuse. These problems were not present in their second marriage to each other. They

enjoyed an active sexual relationship. Their division of household work fell heavily on Ms. Hensley due to long absences occasioned by the military assignments of Mr. Hensley. Prior to the motor vehicle accident, Mr. Hensley had planned to spend 30 years in the military.

31. As a direct result of the motor vehicle accident, Mr. Hensley retired after only 20 years in the military in order to be at home to assist his wife. Long deployments are inconsistent with the attention she requires.

32. The parties' sexual relationship and pleasure has become diminished. Ms. Hensley is no longer an active partner in activities of the marriage and must have assistance with nearly all activities of daily living.

Economic Damage Calculation

33. Pamela Hensley's date of birth is July 2, 1956. She was 44.35 years of age, at the time she was injured.

34. Her life expectancy at the time of injury was 37.57 years.

35. Her work life expectancy for her age and education is 17.32 years with a predicted retirement age of 61.67.

36. But for the injury, she would have continued to work as a cosmetologist.

37. The average earnings for a cosmetologist working in the Oak Harbor, Washington area (assuming full-time employment) is $27,500.

38. Past medical expenses claimed of $20,130.30 are reasonable and necessary and are causally related to the motor vehicle accident of November 6, 2000.

39. Future medical expenses will require lifelong monthly doctors' visits costing $222 per visit, and $600 per month in medication expenses.

40. The Court accepts the calculations of Dr. Silverberg regarding the calculation of household services as fair and accurate. The Court accepts the 1% discount rate to reduce that figure to present value. The Court accepts the calculation of the tax rate. The government has offered no testimony or evidence on the economic calculation.

41. The Court finds Ms. Hensley's economic damages as follows:

	November 6 2000 to April 17 2006	**April 17 2006 to End of Life Expectancy**	**Total**
Earnings/Lost Earning Capacity	$138,223	$ 301,024	$ 439,247
Tax on Earnings	(5,387)	(13,755)	(19,142)

Household Services	117,059	832,024	949,083
Tax on Interest	----------	45,810	45,810
TOTAL	$249,895	$1,165,163	$1,415,058

42. Future medical expenses, calculated to present value using the 1% discount rate, equals $268,987.

Non-economic Past and Future Damages

43. For loss of consortium, Mr. Hensley's damages are $100,000.

44. For Ms. Hensley's pain and suffering and her loss of enjoyment of life, the damages are $500,000.

Administrative Claim

45. The parties have stipulated that the administrative claim made in November 2004 was $1.4 million for Ms. Hensley and $200,000 for Mr. Hensley.

46. In January 2006, Ms. Hensley suffered an increase in pain and loss of ability to enjoy life. Her depression deepened and her mobility decreased. This change in condition was caused by the development of the hematoma after an injection which was supposed to reduce her pain. This is newly discovered evidence which could not have been known to Plaintiffs at time they filed their administrative claim. This additional pain and suffering has further damaged Ms. Hensley in the amount of $50,000.

CONCLUSIONS OF LAW

Jurisdiction, Venue, and Applicable Law

1. The Court has jurisdiction over the subject matter and parties to this action based on the Federal Tort Claims Act, 28 U.S.C. § 1364(b), 28 U.S.C. §§ 2671-2680 and 28 U.S.C. § 1331, and venue is proper.

2. Washington law applies with respect to all claims asserted in this case.

3. The Court incorporates by reference its prior orders dated September 21, 2004 (Dkt. No. 27) and March 13, 2006 (Dkt. No. 91) concerning the applicable statute of limitations and the issue of the Court's jurisdiction over Plaintiff's claims.

4. The standard of proof is a preponderance of the evidence.

5. The government is liable for the negligence of Edward Eich as he was within the scope of his employment as a U.S. Naval officer at the time of the collision on November 6, 2000.

6. Mr. Eich was negligent in the operation of his car, resulting in the collision of November 6, 2000. The following car has the duty to avoid colliding with the forward car.

7. Damages have been awarded applying Washington law, including the application of Washington Pattern Jury Instructions - Civil WPI 30.17 and WPI 30.18. Damages were proved at the time of trial in the trial in the amounts of

Mr. Hensley	**Loss of consortium**	**$100,000**
Ms. Hensley	**Non-economic**	**$500,000**
	Economic	**$1,415,058**
	Post-claim filing	**$50,000**

8. The plaintiffs are limited in their recovery to the amount of their administrative claim, except where the increased amount is based upon newly discovered evidence. Judgment should issue against the United States in the amount of $1,450,000 for Ms. Hensley and $100,000 for Mr. Hensley; the additional $50,000 for Ms. Hensley is awarded for increased pain and suffering due to the January 2006 injection.

Plaintiffs are directed to prepare a judgment. Cost bills are to be directed to the Clerk of the Court.

Dated: May 1, 2006

/s/ Marsha J. Pechman
U.S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAMELA and MICHAEL HENSLEY, Plaintiffs, v. UNITED STATES OF AMERICA, et al. Defendants.	NO. C04-302P ORDER ON DEFENDANT USA'S MOTION TO DISMISS

This matter comes before the Court on Defendant USA's Motion to Dismiss for Lack of Subject Matter Jurisdiction. Having reviewed all the pleadings and supplementary materials, the Court DENIES Defendant's Motion. Defendant argues that this Court has no jurisdiction over Plaintiff's claim under the Federal Tort Claims Act because Plaintiffs did not first file an administrative claim with the USA within two years of the injury. Defendant further argues that equitable tolling in this case is not appropriate. However, Defendant's arguments do not apprehend that the controlling law is the law of this case as set forth in this Court's September 21 Order. This is not an equitable tolling case, and Plaintiffs have carried their burden of establishing this Court's jurisdiction under the rules set forth in this Court's previous order.

Background

Plaintiff Pamela Hensley was injured in an automobile accident at the Whidbey Island Naval Air Station which she alleges was caused by Lieutenant Edward Eich, a member of the U.S. Navy. (2nd Am. Compl. at 2). Defendant USA was substituted as the party defendant for Edward and "Jane Doe" Eich after the U.S. Attorney General certified that Lt. Eich was acting in the course and scope of his employment at the time of the accident. (See Notice of Substitution and Mot. to Dismiss at 1, dated Mar. 29, 2004; Order on Mot. to Dismiss dated Sept. 21, 2004).

The accident occurred near the front gate of the Naval Air Station. (See Mot. to Dismiss, Ex. 1, Dep. of Pamela Hensley at 3). Lt. Eich was on duty and in uniform (id. at 1-2), but he was driving his personal vehicle, (Pl. Opp'n at 3). After the accident, Hensley was taken to the a naval hospital where a military police officer provided her with a Vehicle Information Exchange Sheet that had Lt. Eich's name and contact information. (Mot. to Dismiss at 2). The officer also told her to contact Lt. Eich's private insurer, Defendant USAA. (See Order on Mot. to Dismiss dated Sept. 21, 2004 at 2). Hensley claims that USAA representatives told her several times that Washington's statute of limitations is three years and that she had plenty of time to file suit. (Decl. Hensley dated Apr. 19, 2004, at 2-4). Hensley did not present an administrative claim to the USA, but instead filed suit in state court within the Washington statute of limitations, but outside the FTCA's statute of limitations.

After this Court denied Defendant's last motion to dismiss, Pamela Hensley admitted at her deposition that she noticed Lt. Eich was in uniform after the accident. (Mot. to Dismiss at 2). She also said that the officer at the hospital told her to contact her own insurance carrier, but later corrected her testimony to reflect that she was told to contact Lt. Eich's carrier, explaining that she was confused because both she and Lt. Eich have the same insurance carrier. (See Pl. Opp'n at 2).

Analysis

This Court previously held that "in the circumstances where a plaintiff cannot reasonably be expected to realize that a cause of action lies under the FTCA, it is sufficient for federal jurisdictional purposes that, prior to removal to federal court, the suit is instituted within the limitations period" set forth by applicable state law. (Order on Def 's. Mot. to Dismiss dated Sept. 21, 2004 at 7). The Court also held that a claim under the FTCA does not "accrue" for purposes of the statute of limitations in § 2401(b) until the plaintiff knows or reasonably should know that the alleged tortfeasor was acting within the scope of his or her federal employment. (Id.). The September 21 Order is the law of this case. See United States v. Phillips, 367 F.3d 846, 856 (9th Cir. 2004) ("issues that a district court determines during pretrial motions become law of the case.").

While the USA does not appear to be moving for reconsideration of the September 21 Order, it does not seem to grasp the governing law or the procedural posture here. Because it repeats the argument it made previously against jurisdiction and focuses on

equitable tolling, a clarification of this Court's ruling may be appropriate.

In the September 21 Order, this Court was persuaded by the decision in Kelley v. United States, where the court rejected a challenge to jurisdiction on facts very similar to those in the instant case, holding that "Congress could not have intended the [FTCA] to require that "a plaintiff must have filed a[n] [administrative] claim he did not know he had." 568 F.2d 259, 266 (2nd Cir. 1978). This Court found Kelley to support its view that it would be unjust to "penalize plaintiffs for their failure to file an administrative claim which they could not reasonably be expected to know they had." (Order dated Sept. 21, 2004 at 6).

Defendant USA's only acknowledgment of the reasoning in this Court's prior order is its assertion that the Second Circuit in Celistine v. Mount Vernon Neighborhood Health Center recognized that Kelley was abrogated by passage of the Westfall Act, Pub.L. 100-694, 102 Stat. 4563 (1988). (See Reply at 2, citing Celistine, 403 F.3d 76, 83 (2nd Cir. 2005)). However, the Celistine court also held that the Westfall Act did not entirely supersede Kelley. 403 F.3d at 84. It explained that where a plaintiff has sued a tortfeasor that she does not know was acting as an agent of the USA, and files suit outside the FTCA's statute of limitations but still inside a state statute of limitations that is longer than the limitations period of the FTCA, the reasoning of Kelley is still valid. Id.

Therefore, Celistine clearly articulates the basis of this Court's prior ruling. Washington's statute of limitations is three years, RCW 4.16.080(2), and

Plaintiff has diligently pursued her rights by bringing suit within that time frame, albeit outside the FTCA's two year limitations period. Under such circumstances, it would be unjust and inconsistent with the purpose of the FTCA to deny her a forum because she did not file an administrative claim that she has sufficiently established she did not know she had. See Celistine, 403 F.3d at 83, quoting Kelley, 568 F.2d at 265-68.

Nevertheless, instead of looking to the law of this case, Defendant argues that general equitable tolling principles should be applied here. (See e.g., Mot. to Dismiss, 6-10; Reply, 4-5). Defendant relies on Dyniewicz v. United States, 742 F.2d 484 (9th Cir. 1984) to argue that Plaintiffs' claims are time-barred because their causes of action accrued on the date of injury, not when they realized Lt. Eich was acting in the course and scope of his employment. (Id. at 6-8). However, the authorities cited by the USA are inapposite.

The Dyniewicz court held as it did based on the general rule in tort law that the claim accrues at the time of injury, but it also noted that in certain cases, usually involving medical malpractice, the claim may not accrue until the plaintiff knows or should know of both the injury and its cause. 742 F.2d at 486. The instant case falls closer to the medical malpractice exception than the general rule, as it is one of a "sub-class of [FTCA] cases ... in which a driver of a motor vehicle who is a federal employee is sued individually because the plaintiff ... did not understand that the employee was on federal business at the time of the accident." (See Order dated Sept. 21, 2004 at 3-7, quoting Kelley, 568 F.2d 259, 262 (2nd Cir. 1978)).

The rationale in such cases is that there are some subsets of torts cases where it is inequitable to hold a plaintiff to a strict accrual rule. For this reason, and the reasoning set forth in this Court's September 21 Order, general equitable tolling and accrual precedents are not applicable here.

In evaluating a motion to dismiss under 12(b)(1), "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Thornhill Pub. Co., Inc. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). Once the moving party has submitted affidavits or identified the evidence before the Court that it relies on, the party opposing the motion must also submit affidavits or other evidence to carry its burden of showing that the Court does in fact have jurisdiction. See Ass'n of American Med. Colls., 217 F.3d 770, 778-79 (9th Cir. 2000)

Dismissal is no more appropriate now than it was the first time the USA brought this motion. The USA argues that Plaintiff did not undertake reasonably diligent efforts to discover Lt. Eich's employment status, and that Pamela Hensley's correction of her statement at deposition reveals she was not mislead by the military police officers. (See Mot. to Dismiss at 10). However, Defendant's only new facts are that Plaintiff noticed that Lt. Eich was in uniform after the accident, and that she corrected her deposition testimony. While the latter might support Defendant's erroneous equitable tolling argument, neither of these two facts are conclusive on the issue of Plaintiff's knowledge.

In opposing the USA's motion, Plaintiff Pamela Hensley declares, and Defendant USA has not controverted, that she was only given a Vehicle Information Sheet that disclosed nothing about Lt. Eich's employment. (Pl. Opp'n at 2). Furthermore, she declares that she relied on the representations of USAA representatives that she had three years to file suit in state court under Washington law. (Decl. Hensley dated Apr. 19, 2004, at 2-4). Given these facts, together with the undisputed facts that Lt. Eich was driving his own vehicle and the accident occurred near the exit of the Naval Air Station, this Court finds that Plaintiffs have carried their burden of proving that they did not know and should not have reasonably known that Lt. Eich was acting in the course and scope of his federal employment until the Attorney General formally declared that such was the case.

Conclusion

The USA has produced no new evidence that Plaintiffs knew or should have known that Lt. Eich acted in the course and scope of his employment at the time of the accident, and Plaintiffs have sufficiently established that they did not and should not have known until the USA became a party. Accordingly, this Court has jurisdiction under the FTCA and Defendant's Motion is DENIED.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: March 13, 2006

/s/ Marsha J. Pechman
Marsha J. Pechman
U.S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAMELA and MICHAEL HENSLEY, Plaintiff(s), v. UNITED STATES OF AMERICA, as substituted party for EDWARD and JANE DOE EICH, Defendant(s).	NO. C04-302P ORDER ON MOTION TO DISMISS

This motion presents what appears to be an issue of first impression in the application of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671, et seq.; namely, whether a claim "accrues" for purposes of the federal statute of limitations at the time the tortious event occurs or when the plaintiff knows or should have known that the individual tortfeasor was acting within the scope of his/her federal employment. Under the circumstances here presented, the Court holds that, if a civil action is instituted within the applicable state limitations period, an FTCA claim does not accrue for limitations purposes until the plaintiff knows or should have known that the alleged tortfeasor was acting within the scope of federal employment, and on that basis the government's motion to dismiss pursuant to FRCP 12(b)(1) will be DENIED.

Background

On November 6, 2000, Plaintiff's car was rear-ended on the Naval Air Station Whidbey Island by Lieutenant Edward Eich, a member of the U.S. Navy. Lt. Eich was driving a privately-owned vehicle at the time. Plaintiff was taken to the emergency room; while there she was contacted by an member of the Military Police named Arduengo. Officer Arduengo gave her a Vehicle Information Exchange Sheet listing Lt. Eich's contact information and his private insurer's name, policy number and address. Plaintiff claims (and the defense does not controvert) that Officer Arduengo told her to contact Lt. Eich's private insurer, USAA Casualty Insurance Company ("USAA").

Over the next two years, Plaintiff had numerous contacts with representatives of USAA. Her declaration indicates that she was repeatedly told that the statute of limitations in Washington was three years and that she had plenty of time to file a lawsuit if negotiations with USAA did not resolve the matter. Finally, in September of 2003, she hired counsel who continued to negotiate with USAA and eventually filed suit in state court in October 2003. In February 2004, Lt. Eich removed the case to federal court. On March 26, 2004, the U.S. Attorney certified that Lt. Eich was acting within the scope of his federal employment at the time of the accident.[1]

---

[1] Pursuant to 28 U.S.C. § 2679(d)(1), upon certification by the Attorney General that the defendant employee was acting within the scope of employment at the time of the accident, the action is deemed an action against the United States and the United States is substituted as the party defendant.

At no time prior to the filing of the state court complaint were Plaintiffs informed that Lt. Eich was acting within the scope of his federal employment when his private vehicle struck the car driven by Plaintiff Pamela Hensley. Plaintiffs admit that at no time prior to the state court filing did they file an administrative tort claim with the Department of the Navy, nor have they done so to date.

Discussion

Plaintiffs' allegations of tortious conduct against the United States are governed by the provisions of the FTCA. The statute contains a jurisdictional requirement that an administrative claim must be presented to the appropriate federal agency before a lawsuit may be commenced in federal court. 28 U.S.C. § 2675(a); Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740, 743 (9th Cir. 1991). That administrative claim must be filed within two years after the accrual of the cause of action. 28 U.S.C. § 2401(b). The motion to dismiss pursuant to FRCP 12(b)(1) is premised on the failure to file that claim within that period (which the Government alleges expired on November 6, 2002) and the consequent lapsing of the statute of limitations.

The government's position, however, is premised on two assumptions (for which no authority is provided). The first is that it is permissible to wait until the two-year statute of limitations has elapsed, then certify a federal employee pursuant to § 2679, remove to federal court and dismiss on jurisdictional grounds. In fact, as discussed below, there is case law which holds exactly the opposite, and in circumstances similar (but not identical) to those

presented here, plaintiffs have been permitted to go forward with their lawsuits despite the fact that their federal action was commenced after the two-year limitations period had run.

The problem (not an entirely uncommon one) arises from the conjunction of two apparently incompatible factors. One is § 2679(d), which permits removal to federal court following the filing of a state court lawsuit upon certification by the U.S. Attorney General that the individual defendant was acting within the scope of his/her federal employment. The only time limit on this ability to remove is that it must occur prior to the commencement of trial at the state level.

The second factor concerns the "sub-class of Federal Tort Claims Act cases. . . in which a driver of a motor vehicle who is a federal employee is sued individually because the plaintiff did not know that. . . the employee was on federal business at the time of the accident. The instances in this sub-class of cases are characterized by innocent ignorance or ingenuous blunder." Kelley v. United States, 568 F.2d 259, 262 (2nd Cir. 1978). The dilemma occurs because the plaintiff "could not either be certain that [her] action was one that was appropriate for Federal Tort Claims Act prosecution or exercise control over the time of the removal of the case to the federal court." Id. at 263; see also Henderson v. United States (429 F.2d 588 10th Cir. 1970). The Court would add that plaintiffs are also unable to exercise control over the timing of the U.S. Attorney's certification of the individual defendant as acting within the scope of federal employment.

Other circuits have also addressed this issue and ruled in favor of the "innocently ignorant" plaintiff. In McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980), the removal from state to federal court occurred after the federal statute of limitations had run, but the federal appellate court found that the suit was timely because the state court action was filed within the limitations period.

> "[W]e do not think that Congress intended to allow the United States to 'sandbag' plaintiffs. . . We therefore find that an action brought against a federal driver in state court within the time limitations of 28 U.S.C. § 2401(b) is timely for purposes of the Federal Tort Claims Act when the action is removed to federal court pursuant to Section 2679." Id. at 1243-44.

McGowan was cited with approval by the Ninth Circuit in Staple v. United States, 740 F.2d 766 (9th Cir. 1984), and this Court adopts the position that it was not the intent of Congress in enacting the FTCA to permit the government to cloak itself in immunity by timing the certification of individuals as acting within federal employment to fall outside the limitations period (or, concomitantly, to withhold from "innocently ignorant" plaintiffs the knowledge which would have permitted them to file administrative claims until it is too late to do so).

The cases cited to this point could be distinguished from the instant facts in two regards: (1) the plaintiffs in those cases did, at some point, file administrative claims with the government and (2) their state lawsuits were filed within two years of the

allegedly tortious incidents (even if the commencement of the federal actions via removal fell outside that two-year period). As the analysis below indicates, however, the rationale of those cases is equally applicable to this fact pattern when the issue of when the federal cause of action accrues is properly analyzed.

This brings the Court to the second unsupported assumption underlying the government's position: that a claim "accrues" within the meaning of the FTCA on the date when the alleged tort occurs. Clearly this is not the case: there are a host of circumstances (including those of the above-cited cases and those presented by these facts) under which a plaintiff cannot reasonably be expected to realize that a potential tortfeasor was acting within the scope of federal employment at the time of the alleged tort. In the instant case, Lt. Eich was driving a private vehicle at the time of the accident. Plaintiff was only presented with information regarding the Lt. Eich's private insurance company and was told by a representative of federal law enforcement to contact that private insurer about recompensing her injury. She pursued the case diligently, negotiating with the private insurance company and eventually hiring counsel who filed a lawsuit in state court. There have been no allegations that, at any point along this timeline, she was informed or should have otherwise discovered on her own that Lt. Eich was acting within the scope of his employment as a U.S. Naval Officer when the accident occurred.

The Kelley case was decided on facts almost identical to these. In November of 1972, Kelley was struck by a private vehicle driven by Hunt, an

employee of the U.S. Department of Agriculture. In January 1973, Kelley was interviewed by a representative of the Inspector General for the Department of Agriculture. In May 1973, suit was instituted against Hunt in state court; Hunt's insurance company undertook his defense, but his answer mentioned nothing about his employment or the defenses afforded under the FTCA. It was not until January of 1975 that the U.S. Attorney certified Hunt as a federal employee acting within the scope of his employment and in February 1975 the government removed the case to federal court. In May 1975, Kelley filed an administrative claim with the Department of Agriculture and the government moved to substitute in as party defendant and dismiss the case for failure to timely file an administrative claim.

In upholding the federal district judge's denial of the motion to dismiss, the Second Circuit cited with approval his findings that (1) "plaintiffs were not at fault, had pursued their suit diligently, and had not been advised that the Government was the proper defendant" and (2) "since it was. . . the Government's duty to investigate and promptly certify Hunt's status if he was acting within the scope of his employment, delay could not rightly operate to advantage the Government and prejudice the plaintiffs." Kelley, 568 F.2d at 259. The appellate court concurred in the lower court's ruling that the Government was not permitted to "lull plaintiffs into a false sense of security" by certifying, substituting, and moving to dismiss after the plaintiffs' time to file an administrative claim had supposedly elapsed. Id.

The spirit and rationale underlying the FTCA must be viewed in light of the congressional intent to afford citizens access to the courts to redress torts committed by federal employees in the scope of their employment. "The statute cannot be thought to contemplate that the defense of the case by the United States will consist in moving to dismiss it because no administrative claim against the United States was filed." Id. at 265. To restrict access to the FTCA by a rigid insistence on the filing of an administrative claim within two years of the alleged tort serves "[n]o identifiable public interest":

> *No matter what the date of filing of the suit*, such a reading would require an immediate dismissal of all actions against employees except in the rarest of rare cases, the case in which an administrative claim had been filed and the action against the employee was a precautionary filing made to cover the chance that the employee was acting outside the scope of his authority. The Government is not the wiser or better informed for receiving an administrative claim rather than a complaint; it loses no right or power to deal with the claim. . . Id. at 266 (emphasis supplied)

The Kelley case serves as a reminder that the purpose of the FTCA was to curtail the "old injustice" of immunity from tort prosecution and to protect federal employees acting within the scope of their employment from individual liability. "In exactly the most excusable and understandable case, the case of the plaintiff who sues in ignorance of the fact that the defendant was a federal driver operating within the scope of his employment, requiring an administrative

filing produces the most unjust refinement of interpretation: the plaintiff must have filed a claim that he did not know he had..." Id.

The Court adopts the rationale of the Kelley case in finding that it is contrary to the congressional intent behind the FTCA to penalize plaintiffs for their failure to file an administrative claim which they could not reasonably be expected to know they had. Nothing about the vehicle Lt. Eich was driving signaled in what capacity he was operating at the time of the accident. The information provided by Officer Arduengo, a representative of federal law enforcement, indicated that Plaintiffs' redress lay with Lt. Eich's private insurer, and nothing which occurred from that point until the removal of the case to federal court could reasonably have been expected to alert plaintiffs that their case fell within the purview of the FTCA. Only with the removal of their state suit to federal court and the certification of Lt. Eich's status by the U.S. Attorney (the knowledge and timing of which were entirely within the control of the government) were plaintiffs fairly apprised of the actual nature of their suit.

Interestingly, the Kelley decision stopped just short of the point to which this case has brought the Court:

> It is not necessary to decide in this case whether the two-year claim limitation of Section 2401(b) applies to the case analogically, or whether it is enough that the case was commenced against the employee within the time limited by state law. . . Nor is it necessary to determine whether, for

> purposes of deciding when the claim against the United States accrued, plaintiffs would be entitled to claim a "discovery" date. . . when they learned of the certification. Id. at 268.

Under these facts, it has become necessary to decide that issue. The Court finds that it is entirely in keeping with the purpose of the FTCA to hold that, in the circumstance where a plaintiff cannot reasonably be expected to realize that a cause of action lies under the FTCA, it is sufficient for federal jurisdictional purposes that, prior to removal to federal court, the suit is instituted within the limitations period proscribed by the applicable state law. It is the further holding of this Court that, for purposes of the two-year claim limitation of § 2401(b), a claim does not "accrue" until the plaintiff knows or reasonably should know that the alleged tortfeasor was acting within the scope of his/her federal employment.

This holding does not eliminate the requirement that an administrative claim be filed, it simply recognizes the possibility that, under circumstances such as these, the administrative claim may well be filed following the removal to federal court (as it was in the Kelley case). This is in keeping with the intent of the federal legislative scheme that the parties attempt to work out a resolution of the claim prior to incurring the time and expense of a full-blown trial. The Court anticipates that one or both parties will move for a stay of this matter while that administrative claim is filed and a decision on that claim is reached.

Conclusion

Based on the finding that plaintiffs did not know nor should have discovered that Lt. Eich was acting within the scope of his federal employment at the time of the accident and the holding that the two-year limitations period under § 2401(b) does not commence until a plaintiff knows or should have known that a tort action must properly be brought under the FTCA, the government's motion to dismiss will be denied.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: September 21, 2004

/s/ Marsha J. Pechman
Marsha J. Pechman
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAMELA S. HENSLEY; MICHAEL M. HENSLEY, husband and wife each of them and their marital community thereof

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, as substituted party for Edward and Jane Doe Eich,

Defendant-Appellant

FILED
OCT 16, 2008
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 06-35619

D.C. No.
CV-04-00302-MJP
Western District of Washington, Seattle

ORDER

Before: GRABER and RAWLINSON, Circuit Judges, and WRIGHT,* District Judge.

The Panel has voted to deny the petition for panel rehearing. Judges Graber and Rawlinson have voted to deny the petition for rehearing en banc, and Judge Wright has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

* The Honorable Otis D. Wright II, United States District Judge for the Central District of California, sitting by designation.

No. 08-904

In the Supreme Court of the United States

PAMELA S. HENSLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
THOMAS M. BONDY
WILLIAM G. COLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the two-year statute of limitations for presenting a claim under the Federal Tort Claims Act, 28 U.S.C. 2401(b), begins to run when a prospective plaintiff knows that he has been injured and knows the cause of his injury, or further requires that the plaintiff know that the federal employee alleged to have committed the tort was acting within the scope of his employment before the period begins to run.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Diaz v. *United States*, 165 F.3d 1337 (11th Cir. 1999) 8
Drazan v. *United States*, 762 F.2d 56 (7th Cir. 1985) ... 8, 9
Garza v. *United States Bureau of Prisons*, 284 F.3d 930 (8th Cir. 2002) 7, 8
Gonzalez v. *United States*, 284 F.3d 281 (1st Cir. 2002) 6, 9
Gould v. *HHS*, 905 F.2d 738 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) 6
Jones v. *United States*, 294 Fed. Appx. 476 (11th Cir. 2008) 8, 9
Motley v. *United States*, 295 F.3d 820 (8th Cir. 2002) 8
Skwira v. *United States*, 344 F.3d 64 (1st Cir. 2003), cert. denied, 542 U.S. 903 (2004) 9, 10
Steele v. *United States*, 599 F.2d 823 (7th Cir. 1979) ... 6, 9
T.L. v. *United States*, 443 F.3d 956 (8th Cir. 2006) 6, 8
United States v. *Kubrick*, 444 U.S. 111 (1979) 2, 4, 5, 7
Whittlesey v. *Cole*, 142 F.3d 340 (6th Cir. 1998) 6
Zeleznik v. *United States*, 770 F.2d 20 (3d Cir. 1985), cert. denied, 475 U.S. 1108 (1986) 6

Statute: Page

Federal Tort Claims Act:
28 U.S.C. 1346(b) 1
28 U.S.C. 2401(a) 2
28 U.S.C. 2401(b) 3
28 U.S.C. 2671-2680 1
28 U.S.C. 2679(d)(1) 3

In the Supreme Court of the United States

No. 08-904

PAMELA S. HENSLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 531 F.3d 1052. The opinion of the district court (Pet. App. A13-A25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2008. A petition for rehearing was denied on October 16, 2008 (Pet. App. A44). The petition for a writ of certiorari was filed on January 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, provides that a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within

two years after such claim accrues. 28 U.S.C. 2401(a). In *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court ruled that an FTCA claim accrues (*i.e.*, the two-year statute of limitations period begins to run) when a plaintiff knows that he has been injured and is aware of the cause of his injury, even if he is unaware of his legal rights. *Kubrick* held that when a prospective plaintiff knows that he has been injured and knows the cause of the injury, he "can protect himself by seeking advice in the medical and legal community." *Id.* at 123.

2. On November 6, 2000, a car driven by Pamela Hensley, the wife of a Navy chief petty officer, was hit by a car driven by Ensign Edward C. Eich, on the grounds of the Whidbey Island Naval Air Station in the State of Washington. Pet. App. A2-A3. Eich was in uniform but was driving his personal vehicle. *Id.* at A3. Ms. Hensley saw that Eich was in uniform and knew from seeing the uniform that he was a Naval officer. *Ibid.* Military police were called to the scene and Ms. Hensley was taken to a Navy hospital, where she received treatment. *Ibid.* Ms. Hensley received a "Vehicle Information Exchange Sheet" at the hospital containing Eich's name and information about his personal insurance carrier, United Services Automobile Association (USAA). That sheet did not identify Eich as a member of the military. A military police officer who visited Ms. Hensley at the hospital advised her to follow up with Eich's insurance company. *Ibid.*

During the next two years, Ms. Hensley contacted USAA many times and claimed that USAA told her that she had three years under Washington State law to file suit if settlement negotiations proved unproductive. Pet. App. A3. Ms. Hensley hired a lawyer nearly three years after the accident. The lawyer then pursued fur-

ther discussions with USAA. When negotiations failed, the Hensleys filed suit against Eich and his wife in Washington State court on October 24, 2003, more than two years, but less than three years, after the accident. *Id.* at A3-A4.

3. Eich removed the case to federal court in early 2004. Pet. App. A4. Following certification by the United States Attorney that Eich was acting within the scope of his federal employment at the time of the accident, the United States was substituted for the Eichs as defendant, pursuant to 28 U.S.C. 2679(d)(1). The United States then moved to dismiss the Hensleys' complaint for lack of subject matter jurisdiction because, among other things, of the FTCA's two-year statute of limitations, 28 U.S.C. 2401(b). Pet. App. A4. The district court denied the motion, ruling that the Hensleys' suit was timely. The court reasoned that, "[i]f a civil action is instituted within the applicable state limitations period, an FTCA claim does not accrue for limitations purposes until the plaintiff knows or should have known that the alleged tortfeasor was acting within the scope of federal employment." *Id.* at A33.

Following a bench trial, the district court found the United States liable to the Hensleys and awarded them more than $1.5 million in damages. Pet. App. A5.

4. The court of appeals reversed. It stressed that "[a]t the moment Eich struck [Ms.] Hensley's car with his own, [petitioners] knew both the fact of the injury and its immediate physical cause." Pet. App. A8. The court rejected petitioners' argument that "accrual of [their] claim awaited the moment when they knew or should have known that Eich was acting within the scope of his federal employment." *Id.* at A9.

The court of appeals also rejected petitioners' equitable tolling argument. The court concluded that petitioners had not exercised due diligence in investigating Eich's status at the time of the accident, and that the government had not engaged "in any fraudulent concealment, misconduct, or trickery that would have lulled [petitioners] into letting their rights lapse." Pet. App. A11.[1]

ARGUMENT

Petitioners contend (Pet. App. A9) that the court of appeals erred in holding that their claim under the FTCA accrued when they knew of their injury and its cause, rather than at the later date when petitioners learned that Eich was acting within the scope of his federal employment at the time of the accident. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. In *United States* v. *Kubrick*, 444 U.S. 111 (1979), the Court considered whether the claim of a medical malpractice plaintiff, who was already aware of his injury and its probable cause, did not accrue until he knew, or could have been expected to know, that the medical care he received from the government might have been legally negligent. *Id.* at 118. The Court held that accrual did not await his discovery that he might have a legal claim. The Court rejected the contention "that for statute of limitations purposes a plaintiff['s] ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment." *Id.* at 122. Once a plaintiff is "armed with the

[1] The petition raises no equitable tolling issue, and that issue is therefore not before this Court.

facts about the harm done to him," he can "protect himself by seeking advice in the medical and legal community." *Id.* at 123. The Court further noted that, "[t]o excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government." *Ibid.*

Like the plaintiff in *Kubrick*, petitioners had the essential facts about their injury and its cause. They knew that Ms. Hensley was physically injured when her car was rear-ended by another driven by Ensign Eich. Although they did not know that they might have a legal claim against the United States as Eich's employer, accrual of their cause of action under the FTCA does not await a potential plaintiff's awareness of her "legal rights." *Kubrick*, 444 U.S. at 122.

Petitioner urges that a potential plaintiff's knowledge of her injury's "cause," *Kubrick*, 444 U.S. at 122, must, for purposes of the FTCA, include knowledge "that the injury is caused by a tortfeasor acting within the scope of federal employment," Pet. 7. The court of appeals properly rejected that reading of *Kubrick*. *Kubrick* explained that "armed with the facts about the harm done to him," a prospective plaintiff "can protect himself by seeking advice" from an attorney. 444 U.S. at 123. Similarly, petitioners were aware that "[Ms.] Hensley suffered an injury," and "the cause (a collision)," as well as "the identity of the person who inflicted the injury (Eich)." Pet. App. A8-A9. "[A]rmed as they were with the available facts, [petitioners] could have protected their FTCA claim by seeking legal advice sooner." *Id.* at A9.

Other courts of appeals have also rejected the argument that knowledge of the tortfeasor's federal employment is essential before the FTCA statute of limitations begins to run. See *T.L.* v. *United States*, 443 F.3d 956, 964 (8th Cir. 2006) ("The statute of limitations is not tolled * * * simply because a plaintiff is unaware that an alleged tortfeasor is a federal employee."); *Gonzalez* v. *United States*, 284 F.3d 281, 292 (1st Cir. 2002) ("reject[ing] the plaintiff's claim that the statute of limitations should be tolled on the ground that the plaintiff was unaware of the defendants' status as federal employees"); *Whittlesey* v. *Cole*, 142 F.3d 340 (6th Cir. 1998) ("plaintiff was armed with sufficient information to engage in an investigation of his claim which would have included a determination of the [employment] status of the treating physician"); *Gould* v. *HHS*, 905 F.2d 738, 743 & n.2, 735 (4th Cir. 1990) (rejecting the contention that "*Kubrick* implies that a claim des not accrue until a plaintiff learns the legal identity of the alleged tortfeasor as a federal employee"), cert. denied, 498 U.S. 1025 (1991); *Zeleznik* v. *United States*, 770 F.2d 20, 23 (3d Cir. 1985) (limitations period began to run despite plaintiff's lack of knowledge of INS's involvement), cert. denied, 475 U.S. 1108 (1986); *Steele* v. *United States*, 599 F.2d 823, 827-828 (7th Cir. 1979) (fact that plaintiff was unaware of FAA's control over the electrical current that injured him did not prevent limitations period from starting to run).

Petitioners express concern that cases may arise where "the statute of limitations has run before plaintiff is aware that she has a federal claim." Pet. 10. However, in *Kubrick*, this Court specifically rejected rules that would delay accrual until the plaintiff knew of the government's breach of a duty or had reason to suspect

that a legal duty had been breached. As the Court explained:

> [E]ither of these standards would go far to eliminate the statute of limitations as a defense separate from the denial of breach of duty. * * * It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accordance with what we can ascertain the legislative intent to have been.

Kubrick, 444 U.S. at 125.

2. Petitioners contend (Pet. 5-8) that four circuits (including three that are listed above) have interpreted *Kubrick* in a manner contrary to that of the court of appeals in this case, but petitioners are mistaken. Petitioners' claim would not have been deemed timely under the precedent in any of the circuits on which they rely.

Petitioners cite *Garza* v. *United States Bureau of Prisons*, 284 F.3d 930 (2002), as supporting their argument (Pet. 6, 8), but the Eighth Circuit there expressly noted that, in the absence of deception by the government, a cause of action accrues "when the existence of an injury and its cause are known," and that "the statute of limitations under the FTCA does not wait until a plaintiff is aware that an alleged tort-feasor is a federal employee." 284 F.3d at 935. Although the court of appeals noted the fact that the plaintiff was aware, more than two years before filing suit, of a "relationship" between the halfway house and the Bureau of Prisons—thus confirming that the plaintiff's claims were time-barred—it specifically rejected the contention that the

plaintiff must be aware that the individual who caused the injury was acting within the scope of federal employment. See *id.* at 936 ("lack of awareness that Simpson was a federal employee does not alone toll the statute of limitations"). More recent decisions by the Eighth Circuit confirm that "plaintiff's ignorance of the defendant's federal employee status" does not prevent the limitations period from running unless a diligent inquiry could not have revealed that information. *Motley* v. *United States*, 295 F.3d 820, 824 (2002). See *T.L.*, 443 F.3d at 964. Moreover, even if, as petitioners read *Garza*, Pet. 8, knowledge of a "relationship" between Eich and the federal government were necessary for petitioners' FTCA claim to accrue, their claim would still be untimely because, as the court of appeals observed, Ms. Hensley knew at the time of the accident that Eich was a Naval officer, Pet. App. A3.

Petitioners' reliance (Pet. 6, 8) on the decisions in *Diaz* v. *United States*, 165 F.3d 1337 (11th Cir. 1999), and *Drazan* v. *United States*, 762 F.2d 56 (7th Cir. 1985), is also misplaced. Although those decisions do refer to the plaintiff's knowledge of a "government cause" as necessary before the FTCA statute of limitations begins to run, the Eleventh Circuit has recently explained that those cases refer to "a 'government cause' simply because the government was the defendant in those cases." *Jones* v. *United States*, 294 Fed. Appx. 476, 480 (2008). Both *Diaz* and *Drazan* were "cases involving multiple causes of injury," *id.* at 479, and the courts simply recognized that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the [FTCA] statute of limitations running is knowledge of the government cause, not just of the other cause." *Diaz*, 165 F.3d at 1340 (brackets in

original) (quoting *Drazan*, 762 F.2d at 59). Here, there was only one cause of petitioner's injury, the government cause (Eich), and petitioners were aware of that cause. Neither the Seventh nor Eleventh Circuit further requires in such a circumstance that the plaintiff appreciate the fact that the individual who injured her was a federal employee. See *Jones*, 294 Fed. Appx. at 480 ("Neither *Drazan* nor *Diaz* upset the rule that ignorance as to the alleged tortfesor's *employer* does not toll the statute of limitations."); *Steele*, 599 F.2d at 827-828 (lack of awareness of FAA's role in injury did not toll limitations period).

Finally, petitioner cites (Pet. 6, 8) the First Circuit's decision in *Skwira* v. *United States*, 344 F.3d 64 (2003), cert. denied, 542 U.S. 903 (2004) for the proposition that a plaintiff must know "sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury." *Id.* at 78. *Skwira* is of no assistance to petitioners, however. As noted above, in *Gonzalez*, the First Circuit "rejected the plaintiff's claim that the [FTCA] statute of limitations should be tolled on the ground that the plaintiff was unaware of the defendants' status as federal employees." 284 F.3d at 292. The panel in *Skwira* did not purport to overrule *Gonzalez*, but instead explained it as establishing that "where the *personal* identity of the [immediate tortfeasor] is * * * known to the [plainitff], knowledge of the *legal* status of the [tortfeasor] as a federal employee is not required for claim accrual." 344 F.3d at 76. *Skwira* held that in other contexts, where "the identity of the individual(s) responsible for an injury may be less evident," the limitations period should not run "until a reasonably diligent plaintiff has reason to suspect a gov-

ernmental connection with the injury." *Id.* at 77.[2] By its own terms, *Skwira* is inapposite in a situation like this, where petitioners knew the "*personal* identity" of the tortfeasor (Eich). *Id.* at 76. But, even under *Skwira*'s articulation of the standard, petitioners' FTCA claim would be untimely because Ms. Hensley had "indications of government involvement," *id.* at 80, at the time of the accident, when she realized that Eich was a Naval officer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
THOMAS M. BONDY
WILLIAM G. COLE
Attorneys

APRIL 2009

---

[2] In *Skwira*, the injury (Skwira's death) occurred at a Veterans Affairs Medical Center. 344 F.3d at 67. The cause of death was originally listed as heart failure, and Skwira's family only later learned that he had, in fact, been poisoned by a nurse at the medical center. *Id.* at 67, 69.

127 (3)

No. 08-904

Supreme Court, U.S.
FILED
APR 4 - 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

PAMELA S. HENSLEY; MICHAEL M. HENSLEY, husband and wife each of them and their marital community thereof,

Petitioners,

v.

UNITED STATES OF AMERICA, as substituted party for Edward and Jane Doe Eich,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Howard M. Goodfriend
Counsel of Record
Catherine W. Smith
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

Attorneys for Petitioners

TABLE OF CONTENTS

A. This Court Has Not Resolved The Issue Whether A Claim Accrues Under The FTCA Only When A Plaintiff Becomes Aware That The Government Caused His Injury. 1

B. The Circuits Have Not Uniformly Adopted The Government's Position That An FTCA Claim Is Barred Where The Government's Involvement In Causing Injury First Becomes Apparent Upon Westfall Certification And Removal. 3

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Celestine v. Mt. Vernon Neighborhood Health Center, 403 F.3d 76 (2nd Cir. 2005) 5

Crown Coat Front Co. v. U.S., 386 U.S. 503, 87 S.Ct. 1177, 18 L. Ed. 2d 256 (1967) 2

Gonzalez v. United States, 284 F.3d 281 (1st Cir. 2002) 4

Gould v. Department of Health and Human Services, 905 F.2d 738 (4th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991) 4

Jones v. United States, 294 Fed. Appx. 476 (11th Cir. 2008) 4

Reading Co. v. Koons, 271 U.S. 58, 46 S.Ct. 405, 70 L. Ed. 835 (1926) 2

Santos ex rel. Beato v. United States, 559 F.3d 189 (3rd Cir. 2009) 5

T.L. ex rel. Ingram v. United States, 443 F.3d 956 (8th Cir. 2006) 4

United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) 1, 3

FEDERAL STATUTES

28 U.S.C. § 2401 ..... 2, 4-6

28 U.S.C. § 2679 ..... 2, 5

Petitioners Pamela and Michael Hensley submit this reply in support of their petition for certiorari pursuant to Rule 15-6.

A. This Court Has Not Resolved The Issue Whether A Claim Accrues Under The FTCA Only When A Plaintiff Becomes Aware That The Government Caused His Injury.

This Court has never held that a cause of action accrues under the Federal Tort Claims Act's two-year statute of limitations even though a plaintiff is unaware that a federal actor caused his or her injury. The respondent correctly notes that the Court in ***United States v. Kubrick***, 444 U.S. 111, 123, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) held that an FTCA claim accrues when a plaintiff reasonably becomes aware of the fact of injury and its cause, and does not await awareness of the fact "that his injury was negligently inflicted." 444 U.S. at 123. However, the Court in ***Kubrick*** did not answer the question whether the "cause" of an injury is limited to the "immediate physical cause," as the Ninth Circuit held below. (Pet. App. A-8)

The respondent relies on the Court's holding in ***Kubrick*** that an injured party must exercise due diligence "by seeking advice in the medical and legal community." 444 U.S. at 123. But the holding in ***Kubrick*** was based on the sensible policy that "accrual" under the FTCA should not turn on a plaintiff's decision to consult counsel to determine the legal consequences of a known injury after the applicable limitations period. The government's contention that a cause of action always "accrues"

when a plaintiff knows of the immediate physical cause of the injury ignores the fact that under the unique circumstances of the Westfall Act, the government's responsibility in causing an injury, and therefore the liability of the United States, is exclusively controlled by the Attorney General's decision to certify that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose. . ." 28 U.S.C. § 2679(d)(2). "Accrues" under 28 U.S.C. § 2401(b) must be defined with reference to the practical manner in which the government waives its sovereign immunity:

> The Court has pointed out before, however, the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.' Such words are to be 'interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.' ***Reading Co. v. Koons***, 271 U.S. 58, 62, 46 S.Ct. 405, 406, 70 L.Ed. 835 (1926).

Crown Coat Front Co. v. U.S., 386 U.S. 503, 517, 87 S.Ct. 1177, 18 L.Ed.2d 256 (1967).

The Ninth Circuit held that the Hensleys "could have protected their FTCA claim by seeking legal advice sooner." (Pet. App. A-9) But a plaintiff's knowledge that a defendant was acting within the scope of government employment is not the same as

knowledge that a defendant's negligence caused plaintiff's injury. While a plaintiff may by seeking legal advice learn that the harm resulting from the defendant's conduct was "negligently inflicted," ***Kubrick***, 444 U.S. at 123, the defendant's governmental status will only be established when the government certifies that its employee was performing the government's business.

B. The Circuits Have Not Uniformly Adopted The Government's Position That An FTCA Claim Is Barred Where The Government's Involvement In Causing Injury First Becomes Apparent Upon Westfall Certification And Removal.

Under the government's argument, a claim can accrue, and therefore be irretrievably lost, even though a plaintiff in fact sought legal advice and filed a lawsuit well before the expiration of the relevant state statute of limitations, as Pamela Hensley did here. While the government argues that Hensley failed to exercise reasonable diligence when she filed her lawsuit within the three years provided by Washington law, the district court found as a matter of fact that she acted with reasonable diligence by contacting Eich's private insurer, as advised by the military police on the day of the accident, and by consulting counsel only after she was unable to settle her claim herself within Washington's three-year statute of limitations, as advised by Eich's insurance adjuster. (Pet. App. A-32, 34-35)

The issue is not whether the plaintiff's access to her own medical records will put a plaintiff who was injured as a result of medical treatment on notice

of a treating physician's federal employment status, as in the cases cited in the government's brief. *See, e.g.*, ***Jones v. United States***, 294 Fed. Appx. 476, 477-78 (11th Cir. 2008) (plaintiff retained counsel and obtained medical records within two years, but filed federal tort claim more than three years following son's treatment); ***T.L. ex rel. Ingram v. United States***, 443 F.3d 956, 964 (8th Cir. 2006) ("Ingram was provided with many other medical records well before the limitations period. . ."); ***Gonzalez v. United States***, 284 F.3d 281, 285 (1st Cir. 2002) (mother consulted counsel within four months of child's birth); ***Gould v. Dept. of Health and Human Servs.***, 905 F.2d 738, 743 (4th Cir. 1990) (plaintiff retained counsel, who failed to "ma[k]e any effort to investigate" medical records until almost three years after death), *cert. denied*, 498 U.S. 1025 (1991).

In such circumstances, investigation of the injury-causing conduct itself will reveal the defendant's federal status. The issue here instead is the consequence of the government's certification of federal actor status independent of the records relevant to the injury.

Even in the medical malpractice context, the circuits do not, as the government asserts, uniformly hold that the two-year statute of limitations in 28 U.S.C. § 2401(b) will "run out" on injury victims who have not reasonably learned that the federal government is responsible for their injuries until the Attorney General certifies a case under the Westfall Act. For instance, the Third Circuit recently reversed dismissal of a FTCA case more than two years after injury because it was timely commenced under

Pennsylvania law in state court, and the first notice of the federal status of the state court defendant was when the government filed its certification and removed the case to district court under 28 U.S.C. § 2679(d)(2). ***Santos ex rel. Beato v. United States***, 559 F.3d 189 (3rd Cir. 2009).

The Third Circuit in ***Santos*** relied on the equitable tolling doctrine to toll the FTCA's statue of limitations because Santos could not have reasonably discovered that she was injured by government employees. Santos had "acknowledged that she filed her claim in the state court more than two years after its accrual. . . ," ***Santos***, 559 F.3d at 192, and the Third Circuit recognized the cases, relied on by the government here, that hold that a claim "accrues" upon discovery of the physical cause of the plaintiff's injury. The ***Santos*** court nonetheless held that "it would be inequitable to allow [the government] to avoid potential liability by reason of a limitations provision whose applicability a reasonably diligent claimant did not discover." ***Santos***, 559 F.3d at 203. *See also* ***Celestine v. Mt. Vernon Neighborhood Health Center***, 403 F.3d 76, 83-84 (2nd Cir. 2005).

Whether analyzed as an equitable exception under the tolling doctrine, or in terms of "accrual" under 28 U.S.C. § 2401(b), a cause of action that is timely under state law should remain timely under the FTCA if the plaintiff, in the exercise of reasonable diligence, does not learn that her injury resulted from the acts of the government until the government exercises its right of removal and "conclusively establish[es]" the government's responsibility under the Westfall Act. 28 U.S.C. § 2679(d)(2).

CONCLUSION

This Court should accept certiorari and hold that a claim under 28 U.S.C. § 2401 accrues when a plaintiff knows, or reasonably should have known, not just the fact of injury, but its governmental cause.

DATED this 1st day of May, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: Howard M. Goodfriend
Counsel of Record
Catherine W. Smith

Attorneys for Petitioners Hensley